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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 43810-1-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

OLD CITY HALL, L.L.C., a Washington corporation,
Appellant,

v.

PIERCE COUNTY AIDS FOUNDATION, a Washington non-
profit corporation,
and
PEGGY FRAYCHINEAUD GROSS, ATTORNEY AT LAW, a
Washington sole proprietorship,
Respondents.

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
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Michael R. Garner (WSBA #8898)
Theresa H. Wang (WSBA #39784)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000

Attorneys for Appellant Old City Hall,
LLC

ORIGINAL

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I. INTRODUCTION

Respondents waived their rights to assert constructive eviction at some point between 2005 through 2009, after remaining in the supposedly untenable Premises for years. The trial court also erred with regard to Respondent PCAF by denying OCH the opportunity to explore the testimony of the only known witness who could testify about PCAF's decisions, actions and inaction throughout the time the Premises were allegedly untenable.

On Respondents' motions for summary judgment, the trial court inappropriately assumed the role of fact-finder and failed to address the unreasonableness of Respondents' failure to vacate the supposedly untenable Premises. In doing so, the trial court inappropriately adopted the Respondents' move-out dates as the date of constructive eviction. It did so in spite of the fact that the Respondents submitted these dates as the date of "constructive eviction" for the first time on the day of oral argument.

This is not the function of the trial court on summary judgment. The proper standard is for the trial court to determine whether there are material facts in dispute. Here, reasonable minds could differ as to whether the Premises was fit for Respondents' needs, and whether

Respondents' failure to vacate the Premises constituted waiver of their right to assert constructive eviction.

The trial court's order lacked sufficient factual findings and should be vacated. The Court should remand the case and allow OCH the opportunity to depose Representative Jeanne Darnielle, and order the trial court to conduct a full trial to make the appropriate findings of fact as to whether and when Respondents waived their rights to assert the defense of constructive eviction.

II. ARGUMENT

A. OCH Had Good Reason for the Timing of Rep. Darnielle's Deposition

OCH's current counsel appeared in this case only months before the Deposition of Duane Wilkerson in November 2011. CP at 728-35. Promptly after Mr. Wilkerson's deposition, OCH informed Respondents it intended to depose Rep. Darnielle as soon as possible. *Id.* Both PCAF's and Ms. Gross's counsel knew of OCH's repeated efforts to schedule the deposition, and to accommodate the witness's schedule, as well as those of all three parties' counsel. *Id.* OCH had secured a date for Rep. Darnielle's deposition on January 24, 2012, and issued a notice of deposition for Rep. Darnielle. *Id.* At the last minute, Rep. Darnielle had a conflict with the legislative session and had to reschedule. *Id.*

During this time, Respondents evidently scheduled a hearing date for their motions for summary judgment. *Id.* Respondents cooperated in OCH's efforts to schedule Rep. Darnielle's deposition for a date they presumably knew would occur after the hearing of their motions for summary judgment. *Id.* Rep. Darnielle's deposition was to take place less than two weeks after the hearing date for Respondents' motions for summary judgment. *Id.* OCH was forced to file a motion for continuance. Respondents knew OCH considered Rep. Darnielle's testimony to be relevant and was in the process of scheduling it -- such constitutes good reason for a short continuance of the hearing on Respondents' motions for summary judgment so OCH could depose Rep. Darnielle.

B. Rep. Darnielle's Testimony is Material and Relevant to the Question of When PCAF Waived Constructive Eviction

The trial court order dated May 14, 2012, stated simply that "Plaintiff's motion to continue the hearing to allow the deposition of Representative Darnielle was denied on the grounds that testimony was not relevant to the issue of the conditions at the time of Defendants' vacation of the premises." But OCH did not seek Rep. Darnielle's testimony to establish the conditions of the Premises when PCAF breached the lease agreement; it sought evidence regarding PCAF's actions in the years *before* this time and the factual basis for its repeated,

on-going decision to remain in the supposedly untenable Premises for the four years preceding its breach.

To this end, PCAF's brief correctly describes as incomplete the record with regard to the identities of PCAF's decision-makers from 2005 through 2008. OCH sought to determine the identity of those decision-makers and the reasons for their decisions, and create the relevant factual record of these events, but was denied the opportunity.

Furthermore, PCAF's argument that the witness could not have knowledge regarding a constructive eviction in 2009 misses the point. OCH denies any constructive eviction occurred in 2009, and sought to depose Rep. Darnielle to determine whether PCAF may have waived constructive eviction as an affirmative defense in 2005, 2006, and 2007 or even in 2008 before Mr. Wilkerson took over as Executive Director of PCAF. PCAF states without basis that Rep. Darnielle would not have had knowledge relevant to its motion for summary judgment. But this is not the relevant standard -- PCAF may not unilaterally determine what is relevant and what is not. Representative Darnielle may have substantial knowledge supporting OCH's defenses to PCAF's motion.

Instead, OCH was entitled to explore the scope of Rep. Darnielle's knowledge for itself, as OCH believes her deposition would have revealed material evidence regarding PCAF's actions throughout 2005 to 2008.

OCH stated with specificity the type of evidence it expected to discover, as well as the genuine issues of material fact that would be raised. The trial court erred by hearing the motions for summary judgment without allowing OCH this opportunity. The court's order denying a short continuance for OCH to depose Rep. Darnielle constitutes manifest error and should be reversed.

C. The Trial Court Failed to Make Sufficient Factual Findings Regarding Respondents' Alleged Constructive Eviction

The proper standard for determining whether a constructive eviction has occurred requires that "the trier of fact . . . determine the question of fact whether or not there has been an eviction." *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc.*, 12 Wn. App. 6, 9, 528 P.2d 502 (1974). No such findings were made here. The trial court lists the alleged deficiencies of the Premises, but does not note whether and/or when any of these conditions gave rise to the defense of constructive eviction. Significantly, the trial court states that "[s]tanding alone, many of them would be sufficient as a matter of law for constructive eviction." CP at 765-775. But the trial court does not elaborate on when such conditions would have effectively deprived Respondents of their use of the Premises such that constructive eviction occurred. In light of the relevant

time period of four years, such cursory findings are insufficient for summary judgment.

Respondents' briefs spend pages describing the condition of the Premises since 2005, discussing the supposedly defective conditions at length. Leased premises are "untenable" for purposes of constructive eviction where they are "unfit for the purpose for which they are leased." *Tucker v. Hayford*, 118 Wn. App. 246, 254, 75 P.3d 980 (2003). To raise such an affirmative defense to breach of a lease agreement, tenants must abandon the Premises when the Premises are unfit or unsuitable for occupancy for the purpose for which they are leased. *Erickson v. Elliott*, 177 Wash. 229, 233, 31 P.2d 506 (1934).

Here, not only did they fail to immediately abandon the Premises, but both Respondents remained in the Premises and operated their business and organization for a period of years. Despite any alleged defects, their continual presence and continuous business operations are evidence the Premises were suitable for the purpose for which they were leased. In light of that evidence, the trial court erred by failing to making findings as to whether and/or when the Premises became untenable, giving rise to the defense of constructive eviction. The trial court also failed to make adequate findings regarding whether/or when Respondents waived

their right to assert constructive eviction as a defense to their breach of the lease agreements.

Constructive eviction is not a defense for unhappy tenants to assert after years of effectively operating out of the premises only after they have found alternative space. Here, the trial court found that the Premises “ceased to be usable” as intended by Respondents, but fails to state when this occurred. The trial court also failed to consider when Respondents’ retention of the Premises became unreasonable in the three to four years of their tenancy after the defects allegedly became apparent.

The trial court simply adopted the dates of supposed constructive eviction as first proposed by Respondents at the hearing on their motions for summary judgment. Respondents’ briefs are conspicuously silent as to whether and when such a constructive eviction occurred -- instead, Respondents simply list the alleged defects of the Premises from 2005 on. CP at 94-114, 545-561. At no point do Respondents allege, nor does the Court find that some incremental deterioration occurred which rendered the Premises untenable, no “straw that broke the camel’s back.”

The trial court’s failure to make adequate findings of fact is particularly telling with regard to its failure to address the differences between the two Respondents’ sets of facts. Ms. Gross had already purchased an office building for her law practice when she renewed her

lease with OCH, and had not paid her rent for the Premises for several months before she vacated. CP at 722-24; 736. PCAF on the other hand, complained of supposedly defective conditions at the building since 2005, yet continued to operate out of the Premises for many years after that time.

After OCH's 2005 announcement of its intention to convert the Premises into condominiums, both Respondents remained in the building. They point to "years" of building deficiencies and problems with maintenance and the "deplorable" conditions at the Premises; yet they failed to abandon the Premises for years. The parties' competing claims required separate and distinct findings of fact regarding the parties' actions and decisions during the three to four year period when Respondents chose to stay at the Premises. No such findings were made. The trial court erred by granting Respondents' motions for summary judgment without making these findings. The ruling should be reversed.

II. CONCLUSION

The issues of fact involved in Respondents' assertions of constructive eviction and whether they waived the defense by failing to abandon the Premises are inappropriate for disposition on summary judgment. The trial court erred by acting as a fact-finder on motions for summary judgment, instead of applying the correct legal standard for determination of whether there were disputed issues of material fact.

The Court should remand the case and allow OCH the opportunity to depose Rep. Darnielle, and then conduct a full trial on the merits of all claims: to make the appropriate findings of fact with regard to whether Respondents' breached their leases, whether they are liable for damages to OCH, whether and/or when OCH constructively evicted Respondents, and whether and/or when Respondents waived their right to assert this affirmative defense by failing to abandon within a reasonable time.

Dated: January 2, 2013

By: 

Michael R. Garner (WSBA #8898)

Theresa H. Wang (WSBA #39784)

STOKES LAWRENCE, P.S.

1420 Fifth Avenue, Suite 3000

Seattle, WA 98101

(206) 626-6000

Attorneys for Appellant Old City Hall,
LLC

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the 2nd day of January, 2013, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellant," to be delivered by e-mail and U. S. Mail to the following counsel of record:

Counsel for Respondent:

Kathleen Pierce
Morton McGoldrick PS
820 "A" Street, Suite 600
Tacoma, WA 98401
kepierce@bvmm.com

Counsel for Respondent Peggy Fraychineaud Gross:

Richard H. Wooster
Mann, Johnson, Wooster & McLaughlin, P.S.
1901 South "I" Street
Tacoma, WA 98405
rich@kjwmlaw.com

Dated this 2nd day of January, 2013, at Seattle, Washington.



Gary N. Osako, Practice Assistant
gno@stokeslaw.com

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